

**Starwood Hotels & Resorts Worldwide, Inc., d/b/a
Sheraton Universal Hotel and UNITE HERE
Local 11.** Case 21–CA–36429

August 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On December 2, 2005, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

This case concerns the discharge of Front Desk Supervisor Kevin Grace. It is undisputed that the Respondent, a hotel, discharged Grace for refusing to remove a union button from his shirt. The judge found that the discharge violated Section 8(a)(3) and (1) of the Act. The Respondent excepts to this finding, asserting that Grace was a supervisor under Section 2(11) and thus excluded from the coverage of the Act. Based on Grace's authority to effectively recommend discipline and to effectively recommend against hiring applicants, as well as secondary indicia, we find that Grace was a supervisor; thus, the Respondent did not violate Section 8(a)(3) and (1) when it discharged him.

I. BACKGROUND

Overview

Grace worked as one of three front desk supervisors (FDSs) from October 2003 until his discharge on June 25, 2004.² The FDSs were part of a department known as the front office. The front office encompassed guest registration, luggage assistance, concierge services, the switchboard, and guest complaint resolution.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent asserts that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

² All dates herein refer to 2004, unless otherwise noted.

The FDSs reported to Front Office Manager Anton Akopian, who in turn reported to Director of Rooms Tony Fernandez. The FDSs themselves oversaw two positions: (1) the guest service agents (GSAs), responsible for guest registration, and (2) the Sheraton service promise agents (SSPAs), responsible for resolving guest complaints.

As the FDS on duty, Grace was also designated the manager on duty, meaning that he was responsible for the general operations of the entire hotel. In his FDS role, Grace was in charge of the front office area, assisting GSAs with check-in and handling guest complaints that were not resolved by GSAs or SSPAs.

Disciplinary Authority

The Respondent utilized a "coach-and-counsel" approach to respond to employee disciplinary problems. Under that approach, according to Fernandez, whenever Grace decided that employees had violated the Respondent's policies, procedures, or standards, he (Grace) had the responsibility to coach and counsel them. Thus, he spoke with the employees to identify their errors and provide instructions on correct procedures, and when necessary he admonished them for inappropriate conduct. Grace also warned employees that they would face discipline for a second similar offense. Fernandez testified that, when circumstances merited it, Grace would "make recommendations [] for more drastic measures." Grace and other FDSs documented all coach-and-counsel sessions through e-mails to upper management. That documentation was placed in the employee's personnel file as a record of the violation for consideration in the event of a future infraction. In this manner, the coach-and-counsel documentation prepared by Grace initiated the disciplinary process. Grace also had the authority to decide whether to send an offending employee home.

The Respondent used disciplinary forms titled "corrective action notices." The notices included the following steps: verbal, written, final written, suspension, and separation. A "verbal" warning was triggered by documentation reflecting a second coach-and-counsel session about a particular type of infraction. Fernandez characterized the "verbal" warning as the "second major step" in the disciplinary process.

Grace conducted four coach-and-counsel sessions while working for Respondent. Two of the four instances involved the same employee, Tony Chacon.³ On January 31, Grace counseled Chacon for being rude to a guest on the telephone. Grace's documentation of that

³ The other two coach-and-counsel sessions involved (1) an employee who was out of uniform and (2) an employee who assigned guests to the wrong room.

counseling session indicates that he told Chacon that “I will not [accept] guests . . . telling me that one of my staff was rude or abrupt,” that Chacon needed to work on being friendly, accommodating, and helpful and that “this is the last time a guest should . . . tell me that he was not helpful, rude or abrupt.” On February 23, Grace counseled Chacon for two incidents in the same evening: first, Chacon was again rude to a guest on the telephone, and second, he argued with a guest at the front desk and then angrily punched the wall. Grace spoke to the guest and the two GSAs who witnessed the incident. After his investigation, Grace told Chacon that his behavior was “reprehensible” and that he should be prepared to give a statement to upper management and human resources. Although the GSAs told Grace that they thought Chacon should be sent home, Grace decided that such a measure was unnecessary because it was near the end of Chacon’s shift.

Grace documented both of the February 23 coach-and-counsel sessions he had with Chacon in one e-mail that evening. In the e-mail, Grace described how the events unfolded. He wrote:

I will speak to you tomorrow about Tony[’s] version. I also got a version from [the two GSAs] who told me that Tony should be sent home. . . . This was a very serious situation and I made Tony aware of how serious his behavior was, and I told him to be prepared to give a statement to Anton [Akopian], Tony [Fernandez], and possibly HR tomorrow.

As promised in his e-mail, Grace met with Fernandez the next day to further discuss Chacon’s misconduct. Grace recommended that Chacon receive the most severe discipline possible for his conduct. Fernandez testified that he accepted what Grace told him regarding the incident, because Grace was his front office supervisor and “what he says goes.” Consequently, Fernandez and Akopian issued Chacon a “written” warning for violation of hotel rules and regulations, poor service, and scaring two coworkers. At the top of the corrective action notice, Grace was listed as the supervisor, and Akopian and Fernandez as managers. The narrative under “Reason” was consistent with the information relayed in Grace’s coach-and-counsel e-mail:

Mr. Kesselman [guest] complained to FD Supervisor Kevin Grace, who verified with you that you did have an argument with the guest and then you hit a wall out of anger, but out of sight from everyone. Both GSAs on duty also verified that the event took place leading to this incident and gave statements to Kevin Grace. . . .

Hiring Authority

With respect to hiring, Grace reviewed applications and resumes, interviewed applicants, and made hiring recommendations. Fernandez testified that if Grace had recommended hiring an applicant, he would have accepted the recommendation, although he would still have personally interviewed the applicant because it was “part of the process.” Fernandez further testified that a recommendation from Grace not to hire an applicant “would have been fatal.”

Secondary Indicia of Supervisory Status

Grace earned a higher rate of pay than the GSAs or SSPAs, attended management meetings, and received management memos. When Grace began his position as an FDS, he signed two documents that only managers and supervisors were required to sign. Like other managers and supervisors, but unlike nonmanagement employees, Grace had an e-mail account with the Respondent. Grace’s name tag included his first and last name, with the title “supervisor”; the name tags of front office employees, by contrast, stated their first names only.

II. ANALYSIS

Section 2(11) of the Act defines “supervisor” as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An individual need possess only one of the enumerated indicia of authority in order to be a statutory supervisor, so long as the exercise of such authority is carried out in the interest of the employer and requires the use of independent judgment. *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006), citing *California Beverage Co.*, 283 NLRB 328, 328 (1987). The burden of proving supervisory status falls on the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001).

Effective Recommendation to Discipline

The record shows that when Grace recommended discipline of employee Chacon, upper management accordingly disciplined the employee. Fernandez credibly testified that he accepted what Grace told him regarding the incident with Chacon, stating, “[W]hat he says goes.” Indeed, the record indicates that Fernandez followed Grace’s recommendation to accelerate the normal progression of discipline, because he issued Chacon a “writ-

ten” warning rather than lesser discipline such as a “verbal” warning.

In *Progressive Transportation Services*, 340 NLRB 1044 (2003), the Board found that a deck lead supervisor possessed authority to effectively recommend discipline under Section 2(11) because she initiated the disciplinary process. The deck lead supervisor brought disciplinary issues to the attention of the director of housekeeping, who decided the level of discipline based on the supervisor’s account and advised her about the preparation of the disciplinary notice. *Id.* at 1045–1046. The director typically followed the supervisor’s recommendations without an independent investigation. *Id.*

Similarly, in *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474–1475 (2004), the Board found that individuals classified as assistant supervisors were supervisors under Section 2(11) because they were authorized to write recommendations for disciplinary action. Although those writeups were reviewed by an upper manager, the manager had a policy of routinely “signing off” on recommendations if they were justifiable, without conducting an independent investigation. *Id.* at 1474. The Board found that if the assistant supervisor brought a disciplinary matter to the attention of management, discipline would ensue, demonstrating that the assistant supervisors’ disciplinary recommendations were effective. *Id.* at 1475.

Consistent with the above precedent, we find that Grace possessed the authority to effectively recommend discipline using independent judgment. Grace initiated disciplinary action against Chacon by conducting coach-and-counsel sessions with him on January 31, and February 23, concerning misconduct toward guests and documenting those sessions. Furthermore, he followed up on February 24, by discussing the matter with Fernandez and, determining that the circumstances warranted it, made a recommendation that harsh discipline be taken. Fernandez acted in accordance with Grace’s recommendation.⁴

⁴ Our dissenting colleague states that the Respondent regarded the coach-and-counsel approach as training rather than discipline. However, Fernandez’ testimony and the evidence relating to Chacon’s discipline make clear that an employee’s repetition of an offense after an initial coach-and-counsel session prompts disciplinary action. Our colleague also asserts that, after two coach-and-counsel sessions had occurred, upper management met with the employee and decided whether and what discipline was appropriate. There is no evidence to support this assertion. Moreover, the effective recommendation of discipline need not encompass the authority to make disciplinary decisions unilaterally. See, e.g., *Mountaineer Park*, 343 NLRB at 1475.

In addition, our colleague states that Grace did not recommend discipline in his coach-and-counsel e-mails. In the case of Chacon, Grace made his recommendation in his face-to-face conversation with Fernandez. The other coach-and-counsel sessions in the record appear to

Contrary to the judge’s speculation, nothing in the record suggests that upper management conducted an independent investigation before deciding to impose discipline on Chacon. Fernandez described the process that occurred before the issuance of discipline to Chacon, including his discussion of the matter with Grace and Grace’s recommendation. There is no evidence that Fernandez or Akopian spoke directly to the guest or anyone else concerning the incident. The judge simply assumed that such an investigation took place because, although the corrective action notice “generally tracks the information Mr. Grace provided in his February 23 e-mail, there are additional details and quotations that suggest Mr. Fernandez and/or Mr. Akopian conducted additional investigation.”⁵

We find that the additional details cited by the judge merely paraphrase Grace’s documented account and provide no basis for the judge’s inference. The record, including Fernandez’ testimony and the corrective action notice, makes clear that it was Grace who spoke with the guest and the two GSAs who had witnessed the incident. Moreover, the evidence shows that Grace’s e-mail to Fernandez was not the only communication between the two regarding this incident. Rather, they discussed the events in person the following day, at which time Grace recommended that Fernandez discipline Chacon severely.

Neither the corrective action notice nor any other evidence indicates that upper management did anything

involve first offenses, which would not normally result in discipline under the Respondent’s system. In those instances, Grace did not recommend discipline and none was imposed.

Finally, contrary to our colleague’s assertion that the evidence does not show that the Respondent disciplined Chacon because of Grace’s recommendation, Fernandez’ testimony and the corrective action notice made clear that Grace’s actions of conducting the coach-and-counsel session and notifying Fernandez about Chacon’s misconduct, including his attendant recommendation, were prerequisites to the imposition of discipline.

⁵ As examples of information contained in the corrective action notice but not Grace’s e-mail, the judge cited:

- (1) [Your conduct] was described by the guest to be ‘aggressive, rude, and alarming’;
- (2) [A]ccording to the guest, [he] felt that Mohammed [another GSA] was appropriately meeting his needs; and
- (3) [Y]ou took it upon yourself . . . to ‘take over’ Mohammed’s interaction with the guest.

However, very similar statements appear in Grace’s e-mail:

- (a) [T]he guest told me that Tony Chacon was very confrontational, accusatory and rude;
- (b) The guest . . . told me that our hotel needs more Mohammeds and no Tonys; and
- (c) Mohammed was starting recovery with the guest when he noticed Tony coming out to the desk Tony went up to Mohammed, squeezed him away from the terminal and told Mohammed [to] go help other guests.

more than speak with Grace before issuing the warning to Chacon. On the contrary, the corrective action notice expressly cites Grace's investigation. Fernandez also credibly testified that he accepted what Grace told him regarding the incident, stating, "[W]hat he says goes." Thus, Fernandez relied on Grace's judgment.

Our colleague asserts that the issue of whether Fernandez or others conducted an independent investigation is a "close call," and thus the Respondent did not meet its burden of proof on the supervisory issue. In asserting that there is a "close call," our colleague notes only that the Respondent failed to ask witness Fernandez whether he or others investigated the incident before imposing discipline. However, Fernandez credibly testified that he accepted Grace's recommendation because "what [Grace] says goes." That is more than sufficient to establish that Grace made an effective recommendation.

Citing *Jochims v. NLRB*⁶ and *Vencor Hospital—Los Angeles*,⁷ our colleague argues that Grace's documented coach-and-counsel sessions with Chacon and attendant recommendation as to discipline fail to establish Grace's supervisory authority to effectively recommend discipline. Our colleague's reliance on those cases is misplaced.

In *Jochims*, the individual at issue, a nurse, had authority to document infractions affecting residential care at her discretion. *Supra* at 1165. Those writeups would be placed in employees' files for review by management, and management would then decide whether any disciplinary action was warranted. *Id.* Therefore, the nurse's writeups contained no recommendation for discipline; the decision to discipline rested entirely with management.

In *Vencor Hospital—Los Angeles*, the Board declined to find that the issuance of verbal warnings, which were subsequently reduced to writing and placed in the offending employee's personnel file, established supervisory authority to effectively recommend discipline. In reaching that conclusion, the Board relied on several factors: the absence of evidence that the disputed individuals "make any recommendations as to discipline when making such reports," much less specific recommendations as to discipline;⁸ the evidence indicating that upper management would not act on reported incidents without conducting an independent investigation; and the absence of evidence "as to what role these reports play in any

discipline that may be imposed," i.e., that they affect job tenure or status. *Supra* at 1139.

Neither of these cases controls our decision here. Initially, we note that *Jochims* is not on point. The court's holding made clear that its decision does not apply to the present case. The court stated that "this case is not about petitioner's involvement in a 'system' of progressive discipline." *Id.* at 1169. Finding that the Board had not relied on such a system in its underlying decision, the court dismissed the assertion on appeal as a post-hoc rationalization outside the scope of its review. This case, on the other hand, does concern the Respondent's progressive disciplinary system.

Further, in *Jochims*, the connection between the writeups prepared by the nurse and any disciplinary action against an employee was attenuated. Although the forms were retained in the employee's personnel file, the court found that they presented merely the possibility of discipline. No evidence demonstrated that they were a prerequisite to discipline or routinely resulted in discipline. *Id.* at 1170.

Here, by contrast, the record shows that Grace's coach-and-counsel sessions and documentation were a prerequisite to Chacon's discipline. Fernandez indicated that these sessions and attendant documentation were the first step in the Respondent's disciplinary process. During his conversation with Fernandez following up on that documentation, Grace recommended that Chacon be disciplined, and management followed his recommendation without further investigation.

Vencor Hospital—Los Angeles is distinguishable on similar grounds. None of the factors crucial to the Board's decision in that case is present here. First, the record shows that Grace recommended that Fernandez discipline Chacon as severely as possible for his February 23 misconduct, which was an explicit recommendation and quite different than the *Vencor Hospital—Los Angeles* nurse's request for "further action from Administration." Second, as previously noted, Fernandez followed Grace's recommendation the day he received it without conducting an independent investigation. As discussed above, Fernandez relied exclusively on Grace's coach-and-counsel documentation and followup conversation, because Grace was his front office supervisor and "what he says goes." Finally, Chacon's disciplinary notice clearly references Grace's prior warnings, showing that those warnings played a role in Chacon's discipline and affected his job status.

Accordingly, we find that Grace possessed and exercised the authority to effectively recommend discipline of employees.

⁶ 480 F.3d 1161 (D.C. Cir. 2007), reversing *Wilshire at Lakewood*, 345 NLRB 1050 (2005).

⁷ 328 NLRB 1136 (1999).

⁸ The nurse's report stated, "Request further action by Administration," but did not otherwise refer to recommend discipline. *Supra* at 1139 fn. 10.

Authority to Effectively Recommend Against Hiring

The authority to effectively recommend against hiring a candidate can establish supervisory authority. See *Berger Transfer & Storage*, 253 NLRB 5, 10 (1980), *enfd.* 678 F.2d 679 (7th Cir. 1982), supplemented by 281 NLRB 1157 (1986) (supervisory status found where a salesman's recommendation to hire a candidate was followed by interviews with company officials, but his recommendation against hiring a candidate was normally final); *HS Lordships*, 274 NLRB 1167, 1173 (1985) (supervisory status found where a bar manager's recommendations not to hire were followed).

Fernandez testified that hiring recommendations by FDSs were "very, very key," and if Grace recommended that a candidate not be hired, that "would be fatal." Although Fernandez did not discuss specific examples of Grace giving a negative hiring recommendation, Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise. See *NLRB v. Southern Seating Co.*, 468 F.2d 1345, 1347 (4th Cir. 1972), citing *Turner's Express, Inc. v. NLRB*, 456 F.2d 289, 292 (4th Cir. 1972). The evidence must be sufficient to show that such authority does exist. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006).

Here, Fernandez unequivocally testified that he would not hire an applicant if Grace recommended against it. According to Fernandez, if Grace said that he did not like a candidate, his recommendation would be fatal to the candidate's further consideration for hire. Fernandez explained that "we would not have proceeded with a candidate that does not have the support of their eventual Manager."⁹ The judge credited Fernandez, noting that he testified "consistently, forthrightly, and with clear recall." We find that the evidence establishes that Grace possessed the authority to make effective recommendations with regard to hiring.

Secondary Indicia

Finally, there is evidence of secondary indicia to further support Grace's supervisory status. Grace regularly served as manager on duty, his title was "front desk supervisor," and his name tag said "supervisor." Grace had an e-mail account with the Respondent, a privilege exclusive to members of management. Grace was paid more than the employees he supervised. He attended management meetings, received management memos,

⁹ Contrary to the assertion of our dissenting colleague, Fernandez' testimony regarding Grace's role in hiring was not conclusory. Fernandez did not merely state a conclusion, i.e., that Grace had authority to effectively recommend hiring or not hiring. Rather, Fernandez provided undisputed testimony concerning Grace's role and the weight accorded to his recommendations, which established that an applicant not supported by Grace would not be hired.

and signed documents when he began working as an FDS that were only given to members of management. Thus, the Respondent treated and held Grace out to others as a supervisor. Having found that Grace possesses supervisory authority with regard to discipline and hiring, we find that this evidence corroborates our determination of his 2(11) status.

Conclusion

We have found that Grace is a supervisor, based on his authority to make effective recommendations concerning discipline and hiring, as well as secondary indicia.¹⁰ Therefore, the Respondent's discharge of Grace did not violate Section 8(a)(3) and (1). Accordingly, we dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

Contrary to my colleagues, I agree with the judge that Grace was not a supervisor within the meaning of Section 2(11) of the Act. At most, Grace was the sort of "minor supervisory employee" whom Congress intended to bring within the protections of the Act.¹ Thus, I also agree with the judge that the Respondent's discharge of Grace for refusing to remove a union button violated Section 8(a)(3) of the Act. To reach a contrary result, my colleagues in the majority do not give proper consideration to a strongly worded, on-point decision of the United States Court of Appeals for the District of Columbia Circuit. *Jochims v. NLRB*, 480 F.3d 1161 (2007), reversing *Wilshire at Lakewood*, 345 NLRB 1050 (2005). Accordingly, I dissent.

I. BACKGROUND

Grace was a "front desk supervisor" (FDS) who spent most of his shift checking in guests alongside the employees he oversaw. He used a detailed checklist prepared daily by upper management to ensure that the GSAs and SSPAs completed their tasks.² As a FDS, Grace was paid at a higher rate than the GSAs and SSPAs, but like them, he was paid hourly.

As part of his job, Grace was required to coach and counsel other front desk employees if they were not fol-

¹⁰ We find it unnecessary to pass on whether Grace also possessed supervisory authority to assign or responsibly direct employees.

¹ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 279-283 (1974) (discussing legislative history of Sec. 2(11)); see also *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985), *enfd.* in relevant part 794 F.2d 527 (9th Cir. 1986).

² See *Dynamic Science, Inc.*, 334 NLRB 391, 391 (2001) (artillery test leaders who followed detailed assignment sheets prepared daily by upper management failed to exercise the degree of independent judgment necessary for supervisory status).

lowing proper procedures. In his testimony, Director of Rooms Fernandez described coach-and-counsel sessions as helping employees to correct “honest mistakes.”³ Grace conducted four coach-and-counsel sessions while working for the Respondent, only one of which resulted in discipline. Grace did not recommend discipline in any of the coach-and-counsel e-mails he sent to management, and he lacked the authority to issue written warnings on his own.

II. ANALYSIS

Disciplinary Authority

The same reasoning used by the majority here to find that Grace possessed disciplinary authority sufficient to make him a supervisor was rejected by the Court in a very similar case, *Jochims v. NLRB*, supra.⁴ There, the court found that the Board had deviated from precedent when it found that a nurse who issued writeups, which were then reviewed by managers and occasionally resulted in discipline, possessed authority to initiate discipline. The court found that the Board had ignored the following well-established principles:

A long line of Board precedent . . . establishes that written reprimands do not, in and of themselves, constitute discipline or serve as evidence of supervisory authority.

Id. at 1170.

For the issuance of reprimands or warnings to constitute statutory authority, the warning must not

³ Q. What do you mean, by coach and counsel?

A. Meaning, we look at the mistakes as, you know, honest mistakes or, you know, training issues, things of that nature.

So, we encourage our Front Office Supervisors to take our staff aside and coach them in to—what the proper method to use—why the—why we should follow those procedures, in that way, and then, make a note of it and explain, to the staff, that, if they continue breaking the policy, these are the different disciplinary actions that can occur.

But, if they need any assistance, if they need additional training, anything of that nature, they were there to, also, assist.

⁴ The majority takes the position that *Jochims* is not on point because the court in that case did not consider the progressive disciplinary policy. However, existing Board law has already established that, even in the context of a progressive disciplinary policy, issuing a warning does not confer supervisory status if that warning must be reviewed by upper management before discipline is issued. In *Vencor Hospital—Los Angeles*, supra at 1137, the Board found that RN team leaders did not possess supervisory authority to discipline where they were authorized to implement steps 1–4 independently (step 4 being a documented verbal placed in the employee’s file), but where steps 5–7 (written warning, suspension and termination, respectively) were implemented by management above the RN team leaders. The step 4 document was reviewed by management before issuing steps 5–7, just as Grace’s coach-and-counsel e-mails were reviewed by his upper managers before they issued a verbal warning. *Id.* at 1137.

only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.

Id., citing *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989) (internal citations omitted). The court cited, with approval, the Board’s decision in *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) (Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations).

In the present case, the majority makes the same mistakes. Properly applying the foregoing principles to the facts at hand, it is plain that Grace does not possess supervisory authority to discipline or to effectively recommend it.

To begin with, there can be no doubt that Grace did not exercise supervisory authority when he performed his coach-and-counsel duties. As shown above, management regarded the coach-and-counsel sessions as training, not discipline.⁵ Even after an employee received two coach-and-counsels for the same mistake, it was upper management that met with the employee and decided what, if any, discipline to impose. Nor did Grace perform any supervisory action in sending e-mails to management documenting the coach-and-counsel sessions. All of the coach-and-counsel e-mails prepared by Grace were reviewed by upper management, and *none* contained disciplinary recommendations. Nor did they automatically result in disciplinary action. Of the four coach-and-counsel sessions Grace documented, only one resulted in discipline. See *Jochims*, supra at 1165, 1169–1170 (nurse’s writeups contained no disciplinary recommendations, and were reviewed by managers who would occasionally decide to impose discipline; the court deemed the nurse’s authority reportorial, not disciplinary). Accordingly, those e-mails do not establish supervisory status.

The facts of this case are also similar to those of *Vencor Hospital—Los Angeles*, 328 NLRB 1136 (1999), where the Board found that the employer failed to prove supervisory status. That case involved registered nurse team leaders who issued oral warnings that they then documented and placed in the disciplined employees’ files. The reports described instances of poor work performance or misconduct but contained no disciplinary

⁵ The majority states that Fernandez characterized the “verbal” warning as the “second major step” in the disciplinary process; but his testimony on this point, included in the judge’s decision at 8:32–38, was actually less assured. Fernandez stated that the “verbal” warning “would generally be the first major step or the second, I guess, major step, into the disciplinary process.”

recommendation. There were two occasions when the team leaders' reports prompted the hospital's director of nursing to investigate and take disciplinary action. *Id.* at 1137–1138. The Board, however, found that because there was no evidence that the team leaders' reports automatically led to the imposition of suspension or termination, or otherwise affected job tenure or status, the oral warnings and subsequent written reports did not establish supervisory authority. *Id.* at 1137–1139.

Similarly, the one occasion when Grace orally recommended to management that an employee be disciplined does not establish supervisory authority. There was no showing that management disciplined Chacon *because* of Grace's recommendation; it is just as likely that management would have disciplined Chacon based on Grace's e-mail informing it of the underlying incidents. It is also noteworthy that Grace did not recommend any specific action, such as a written warning or suspension. See *Vencor Hospital—Los Angeles*, 328 NLRB at 1139 fn. 10.

Furthermore, the Respondent, which bears the burden of proof with respect to supervisory status in this proceeding, failed to establish that it did not conduct an independent investigation of the underlying events. By comparing the corrective action notice given to Chacon with the coach-and-counsel e-mail sent by Grace, the judge found that upper management had conducted an independent investigation. The majority disagrees with that factual finding, and I acknowledge that it is a close call. But at the hearing, the Respondent failed to ask Fernandez if he or any other manager investigated the incident before imposing discipline. Any lack of evidence, or lack of clarity in the evidence, must be construed against the party bearing the burden of proof. See *Armstrong Machine Co.*, 343 NLRB 1149, 1149 fn. 4 (2004), and cases cited.

Hiring Authority

The judge found, and I agree, that the evidence failed to show that Grace possessed the authority to effectively recommend either that applicants be hired or not be hired. Director of Rooms Fernandez testified that he thought that Grace interviewed applicants and recommended them for hire, but he was “not positive.” Even if Grace recommended someone for hire, Fernandez would still interview the individual and make the final decision. Respondent failed to give even a single example of management's giving significant weight to a hiring recommendation from Grace or any other FDS. Compare *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001) (meat managers found to have supervisory authority to hire or effectively recommend applicants for hire where there was specific evidence that upper managers followed hir-

ing recommendations from meat managers, and that one employee was hired based on a meat manager's interview before upper management met the employee).

The judge also reasonably found that Fernandez's additional statement—that Grace's recommendation not to hire someone would have been “fatal”—was insufficient to prove the matter asserted. The judge, who otherwise generally credited Fernandez' testimony, observed that “no evidence was presented of any applicant to whose employment a front office supervisor objected. . . .” I agree that Fernandez' bare statement, without more, does not establish that the FDSs had the ability to reject applicants for hire. See *Jochims*, *supra* at 1168 (“[s]tatements by management purporting to confer authority do not alone suffice”); see also *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (purely conclusory evidence insufficient to establish supervisory status); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (same).⁶

Other Indicia of Supervisory Status

It is well settled that secondary indicia, i.e., indicators of supervisory status not specifically enumerated in Section 2(11), are considered only if there are one or more 2(11) indicia present. See, e.g., *Central Plumbing Specialties*, 337 NLRB 973, 975 (2002). Here, because there is insufficient evidence of any of the 2(11) criteria, the evidence of secondary indicia is irrelevant. Moreover, the evidence of secondary indicia cited by the majority amounts to little more than that management designated Grace a supervisor. That, of course, does not enable the Respondent to meet his burden. See, e.g., *Jochims*, *supra* at 1168 (“supervisory authority is not conferred on an employee merely by vesting her with a title”).

III. CONCLUSION

There is insufficient evidence to establish that Grace possessed authority to discipline or effectively recommend discipline, or that Grace possessed authority to hire or recommend hiring. In addition, I am troubled by the majority's cavalier treatment of the District of Columbia

⁶ Both cases cited by the majority to support its finding that Grace possessed authority to effectively recommend against hiring are distinguishable. In *Berger Transfer & Storage*, 253 NLRB 5, 10 (1980), *enfd.* 678 F.2d 679 (7th Cir. 1982), supplemented by 281 NLRB 1157 (1986), a salesman was found to be a supervisor primarily because he was “closely involved” with management during an organizing campaign and strike; the evidence of the salesman's involvement with hiring was not in itself persuasive. In *HS Lordships*, 274 NLRB 1167 (1985), the testimony regarding a bar manager's authority to blackball potential hires was considerably more detailed than in the present case. *Id.* at 1171. In any event, the judge in that case did not ultimately base his finding of supervisory status on hiring authority. *Id.* at 1173.

Circuit's decision in *Jochims*, supra. Finally, "the [B]oard has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the [A]ct is intended to protect." *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151 (7th Cir. 1970). That is precisely what has happened here. For all those reasons, I would adopt the judge's findings and conclude that the Respondent violated Section 8(a)(3) by discharging employee Grace.

Sonia Sanchez, Esq., for the General Counsel.

Matthew T. Wakefield and Jonathan P. Barker, Esqs. (Ballard, Rosenberg, Golper, & Savitt, LLP), of Universal City, California, for the Respondent.

Jasleen Kohli, Esq., of Los Angeles, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Los Angeles, California, on September 28 and 29, 2005,¹ upon an order consolidating cases, consolidated amended complaint and notice of hearing (the complaint) issued July 29, 2005, by the Regional Director for Region 21 of the National Labor Relations Board (the Board) based upon charges filed by UNITE HERE Local 11, AFL-CIO (the Union).² The complaint alleges Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.³

II. ISSUES

1. Whether Kevin Grace was, at relevant times, a supervisor of Respondent within the meaning of Section 2(11) of the Act.
2. Whether Respondent violated Section 8(a)(3) and (1) of the Act on June 25, 2004, by discharging Kevin Grace.
3. If so, whether Grace should be afforded the remedies of backpay and reinstatement.

III. JURISDICTION

At all relevant times, Respondent, a Maryland corporation, with a place of business at 333 Universal Terrace Parkway,

Universal City, California, has been engaged in the operation of a hotel providing food and lodging (the hotel). During a representative 12-month period ending December 29, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Universal City, California facility goods valued in excess of \$50,000, directly from points outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In July, Hotel Employees and Restaurant Employees Union, Local 11, AFL-CIO (HERE, Local 11) merged with Union of Needletrades, Industrial, and Textile Employees, AFL-CIO, to form the Union. The Union is a labor organization within the meaning of Section 2(5) of the Act.⁴

IV. FINDINGS OF FACT

A. The Discharge of Kevin Grace

At all times relevant hereto until the July merger that resulted in the formation of the Union, one of the merging entities, HERE Local 11, represented various of Respondent's employees in collective bargaining, including employees in Respondent's front office department (front office). The front office responsibilities included guest registration (handled by guest service agents or GSAs), luggage assistance, concierge, switchboard, and service promise agents (SSPs).⁵ The front office provided guest services 24-hours a day and was staffed with 30-40 employees working three shifts: shift one, 7 a.m. to 3 p.m., shift two, 3 to 11 p.m., and shift three, 11 p.m. to 7 a.m. During the relevant period, Tony Fernandez (Fernandez) served as Respondent's director of rooms and Anton Akopian (Akopian) served as Respondent's front office manager.⁶ Under their supervision, Respondent employed three supervisors at its front desk: Froilan Casanas (Casanas) on shift one, Kevin Grace (Grace) on shift two, and Philippe Bakhoun (Bakhoun), replaced by Kevin Finister (Finister) in June, alternating with Grace on shift two. Shift three had no assigned supervisor.

During the relevant period, Respondent followed a "manager on duty" (MOD) system, in which someone was designated to be responsible for the well being of the entire Hotel and its operation at all times. The front office supervisor on duty served as the MOD with an additional MOD assigned to assist on weekends.⁷ Fernandez was available by telephone, even on his days off, in case "anyone" needed him but was rarely con-

⁴ Where not otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

⁵ Service promise employees resolved guest complaints (so-called guest occurrences or challenges) in keeping with Respondent's mission statement that if a guest were not satisfied, neither was Respondent. GSA and SSP employees were interchangeable. Additionally, during the "night owl" or graveyard hours, night auditors performed closing audits of the Hotel's accounts and prepared accounting reports for the controller.

⁶ Fernandez served as Respondent's front office manager from about 2000 until about 2003 when he was promoted to the position of director of rooms, where he continued to oversee the front office operations. Fernandez left Respondent's employment in December 2004.

⁷ The additional weekend MOD could be a Hotel manager from any of the Hotel departments.

¹ All dates herein are 2004, unless otherwise noted.

² During the course of the hearing, pursuant to a nonBoard settlement between the Charging Party and Respondent, the Charging Party requested withdrawal of charge Case 21-CA-36776, on which charge the General Counsel had based Complaint pars. 1(d), 5(b), and (c), 6, and relevant portions of 7, all of which relate to employee Miguel Aguilar. The General Counsel thereafter moved to dismiss the named-complaint allegations. I granted the General Counsel's motion and remanded those matters to the Regional Director for appropriate action. In light of the General Counsel's motion, it is unnecessary for me to rule on Respondent's motion to dismiss par. 6 of the complaint.

³ Respondent's unopposed posthearing motion to correct the transcript is granted. The motion and corrections are received as ALJ Exh. 1.

tacted during his off hours, as the front desk supervisors “handled the situation . . . [were] very responsible . . . [knew] the policies and procedures . . . took initiative . . . [and] did proper follow through . . . [Fernandez] learned of events upon his return [to the Hotel]. . . .”

Respondent employed Grace as a front desk supervisor from October 2003 until his date of discharge, June 25. In May, Grace contacted union representatives for the purpose of seeking union representation for the front desk supervisor positions. In June, Grace and Casanas signed union membership/authorization cards. It is unnecessary to detail the unsuccessful November attempts made by a union steward/employee delegation to present the authorization cards to management. Counsel for the General Counsel asserts that the conduct of Mathew T. Wakefield (Wakefield) during one of the attempts demonstrates animus toward Grace’s union activities. However, Respondent’s animus is immaterial; Respondent concedes it fired Grace on June 25 because he wore a union button.

On June 25, Grace wore a 1-inch diameter button bearing the legend “Local 11, Hotel Employees & Restaurant Employees Union, Los Angeles” (the union pin) on his right lapel while on duty at the front desk. During Grace’s shift, Fernandez summoned Grace to his office, and told him that it was inappropriate for him to wear the union button as he was part of Respondent’s management team. When Grace declined to remove the button, Fernandez accused him of insubordination and terminated him.

B. The Duties and Authority of Kevin Grace

Three witnesses testified concerning the duties of the front desk supervisors: Grace, Casanas, and Fernandez. After carefully considering the testimony of all three witnesses, I have determined that the testimony of Fernandez, where it conflicts with that of the other two witnesses, should be credited. Fernandez testified consistently, forthrightly, and with clear recall. I note that, at the time of his testimony, he was employed at the Long Beach Hilton hotel, which has no business ties to Respondent; Fernandez may be regarded as an unbiased witness.

In his position as front desk supervisor, Grace was in charge of the front office area, making sure the GSAs fulfilled their responsibilities. In doing so, Grace utilized detailed checklist instructions prepared by upper management, entitled “front desk PM daily checklist instructions,” which specified the steps required to accomplish such tasks as checking new management memos, making sure employees understood the contents, and monitoring guest arrivals and nonarrivals, departures, room moves, room discrepancies, and various matters associated with room billings and payments. Grace spent 70 percent of his workday following the checklist and assisting GSAs with checking in guests. Grace also handled such guest complaints as the GSAs were unable to resolve. In placating dissatisfied guests, Grace had authority to offer them jelly beans, points toward a complimentary stay, late checkout, or bill reductions. If guest injuries, safety or cleanliness concerns, or room-furnishings malfunctions occurred, Grace could direct security, maintenance, or housekeeping to address the problems. Grace also directed employees to cover for or assist other employees as needed. For example, Grace might direct an employee to

attend the bell desk in the momentary absence of the bell person or assign an employee to assist on the switchboard. When front office employees had interpersonal conflicts that affected the work, Grace discussed the problems with them and thereafter communicated the discussion to management personnel with whom subsequent resolution rested.

The front desk supervisors were encouraged to attract new business, which entailed, in part, determining the appropriate room rate the GSAs could charge walk-in customers. On a busy night with high occupancy levels, Grace had discretion to decline to rent a room at a discounted rate. Conversely, on a “dead” night, he could extend the lowest rate available to walk-in customers. While Grace did not have to obtain management approval before determining the room rate for a particular night, he reported the rates to management because Respondent wanted “to stay in communication with all the different shifts and managers.” Although no specific evidence shows that Respondent had established occupancy/room rate policies for Grace to follow, Fernandez’ testimony supports an inference that such guidelines existed. Regarding Grace’s authority to set room rates, Fernandez testified: “Mr. Grace might . . . say . . . go ahead and take the lowest rate available or . . . give that discount, or . . . the employee rate is closed but . . . extend it to those folks. . . .”⁸

To “help develop . . . and cross-train” the front office supervisors, Fernandez had them work on different skill sets, such as scheduling and payroll, so that all of them would have an opportunity to gain some experience in those areas. As did other front office supervisors, Grace prepared front office schedules based on Hotel occupancy projections and prescribed staffing levels. In doing so, he took into account employee seniority established by the collective-bargaining agreement⁹ and vacation and special leave requests.¹⁰ Fernandez considered that Grace effectively “move[d] staffing about and made adjustments, gave people time off as required and also added people on when necessary,” balancing appropriate staffing with the Hotel budget. According to Fernandez:

[T]he union seniority list . . . makes the process a little bit more difficult because of the fact that you have to specify which individuals can work, at what particular times. But, however being a hotel, you have a different flow of business going about. You have to be able to massage those staffing hours and guidelines and you, also, have to . . . talk to the staff about it, whether or not it would be all right, for them to work certain days but you still have to . . . follow strict guidelines, as well as trying to balance what is actually going to be required, for a particular day or week . . . Everyone understands

⁸ In absence of evidence to the contrary, it is reasonable to assume that Grace did not determine what discounts could be applied to room rates, or what the lowest rate or the employee rate was.

⁹ For scheduling purposes, Akopian provided the front office supervisors with a list of employees with approved and pending leave requests and those entitled to preferential shifts based on seniority.

¹⁰ It is not clear what role the front office supervisors played in dealing with special leave requests. Fernandez testified, “. . . sometimes we have to move people with special requests around” but did specify under whose discretion those decisions fell.

... that all schedules are based on occupancy.

Front desk employees were required to submit written requests for days off ("time away" requests) or for specific workdays to a front desk manager or supervisor; during the relevant period, Grace signed a number of such request forms on the line designated "manager approval." With regard to the written "time away" requests, Fernandez testified as follows:

A. [FERNANDEZ] [request for time away forms] are requests for time off, for—if somebody wanted to take vacation time or some special requests. So, these would be filled out and then, whichever Front Office Supervisor was in charge of scheduling, at that time period, would approve or hopefully, move the dates about or disapprove it.

Q. Whose decision would it be, to approve then the time off?

A. That would be the schedule maker or the Front Office Supervisor. If the Front Office Manager was also doing it, then it would be his approval but whoever is actually in charge of the schedule would be in charge of saying yes or no.

Q. Then, what would be the thought process that would go into whether or not one of these would be approved, by a Manager or Supervisor?

A. It really—it is based, on our occupancy. We want our—our Associates to have the time off, especially if they have not had one, to get some rest or getting their special requests, for an event that they have. However, we have to abide, by our scheduling based on business levels. So, if it cannot be done, then, again, we try to work with the staff, as best as we—could—but if it cannot be approved, it will not be approved. Now, they have a—they can elevate it. They can say, you know, can I talk to, you know, the Front Office Manager? Can I talk to Tony but, otherwise, [the front office supervisors] have the authority to say yes or no, on these vacation requests.

Grace also signed on the "manager's signature" line of various payroll/timeclock adjustment forms. Grace called unscheduled employees into work, utilizing the union seniority list, released employees early, and authorized overtime as needed.¹¹ The record does not contain specific information as to what procedures or system Grace may have followed in handling staffing needs. Fernandez testified as follows:

Q. [WAKEFIELD] Did you ever have situations, in which you had too many employees working, at one time?

A. [FERNANDEZ]: Too many, yes, I have.

¹¹ I cannot accept Grace's testimony that he never prepared a schedule, or approved or denied time off, changed schedules, or authorized overtime. In addition to the credibility determination detailed above, the time-off request forms themselves, which show no indication that another level of approval was required, do not support Grace's testimony. Moreover, Grace's assertion that employees extended their shifts into overtime as an incidental consequence of press of business without his prior approval is too implausible to accept.

Q. Would Mr. Grace have had the authority, to send someone home, if there were too many employees working?

A. Yeah. He had to because, again, he is responsible for our manpower hours, for that time period. So, if, let us say, the count dropped or a group changed their plans or they all came in earlier, he is required to—first, he will do it diplomatically: Who wants to go home first? Then, if he does not get enough—enough volunteers, he goes by seniority or he goes by who came in last or first and then, he starts sending people home.

Q. Then, how about if there are not enough employees working? Let us say, somebody did not show up for work. Does he have the authority, to decide who to call in?

A. He could, if he thought it was necessary, to bring in additional staffing. He would have to probably think about whether or not with the staff that he has, whether to extend somebody that is already working there, maybe, extend them overtime, instead of having to call somebody, on their day off, or, maybe, it is a situation where he, himself, probably could just, you know, fill in, for the time period. But, if it is a situation, in which we are really busy, something of that nature, then he is going to have to call in help of [sic] else the night will go haywire or the shift will go haywire.

Q. Does he have to get any authority, before he made any of those decisions?

A. No.

Q. Did he have the authority, to approve time off, for someone?

A. Yes and say, if he was—looking at this—at the schedule, again, one of the things that they would do is, they would go through their file of special requests and vacations and based on that, they will be able to say, okay, this is good. We can do this or not or he can—In most situations, he can approach the staff member and say, you know—stating a case of, we are really busy, at this time. We need everybody, you know, all hands on deck. However, can we move it up a weekend or is there something we can work with, in that manner? So, he would approve or disapprove, in that—in that way.

Q. Now, he would approve or disapprove someone's time off, did he have to go, to you, or any other Manager, to get their okay?

A. No. He would just—he would just say, you know, yes, we can do this or no and this is the reason why.

Grace reminded employees of their break times, which were set by law and by union contract, and covered for their absences if necessary. Grace could use petty cash to purchase food from nonhotel eateries for quick employee consumption when press of business prevented front office employees from taking scheduled breaks,¹² to reward employees for extraordi-

¹² On occasion, front office supervisors told employees they could not have their lunch breaks because the Hotel was too busy. In those situations, the front office supervisors ordered food for employees to eat in the front office, instructing the employees to "[e]at and work. You know, go back, have a few bites of pizza, sip your soda, and then,

nary effort, or to celebrate a special occasion.

For disciplinary notification to employees, Respondent utilized a form entitled "corrective action notice." Respondent's printed corrective action notice lists various categories of employee misconduct with adjacent checkboxes, and, under the designation, "*Type of Action:*" (also with adjacent checkboxes) sets forth the following disciplinary measures: verbal,¹³ written, final written, suspension, and separation. A section labeled "*Reason:*" provides space for written explanation. The front desk supervisors had no authority to effectuate any of the disciplinary measures noted on the corrective action notice. Those disciplinary measures were the province of Fernandez and, on occasion, the director of human resources. The front desk supervisors, including Grace, had responsibility to "coach-and-counsel" employees regarding mistakes and failure to follow training procedures (herein called coach-and-counsel).¹⁴ As noted by Fernandez, Respondent "put a lot of faith in [its] coach-and-counsel methodology," seeing employee mistakes as an opportunity for front office supervisors to take staff aside and coach them in proper procedures. The supervisors could also explain to employees the disciplinary steps that might follow continued infractions and could recommend more drastic discipline to upper management. The supervisors were to document all such coach-and-counsel interactions, copies of which documentation were placed in employee personnel files for use as "a reference" if another, similar infraction occurred. The disciplinary step following a coach-and-counsel was termed a "verbal documentation" (i.e., a documented oral warning), in which a supervisor of Respondent told the target employee, "I am officially speaking to you and we have spoken in the past before."¹⁵

Grace documented what occurred in coach-and-counsels by e-mails to Akopian and Fernandez.¹⁶ The following instances of employee misconduct resulting in coach-and-counsel occurred during Grace's tenure:

1. On January 20, Grace told front desk employee, Keshana Miller, of the importance of working in full uniform, which she assured him she would do in future.

if the bell rings, go back out." Fernandez acknowledged there were times when increased business prevented front office employees from taking their breaks at the proper times, but there is no evidence as to who devised the eat-and-work system or what would happen if an employee wanted to take a scheduled break instead of eating and working.

¹³ Since the progressive disciplinary steps enumerated in the corrective action notice commences with "verbal" action followed by "written" action, presumably the "verbal" action refers to a documented oral warning, as does "verbal documentation" later mentioned by Fernandez.

¹⁴ Casanas described the coach-and-counseling duty as "giv[ing] the staff a reminder."

¹⁵ According to Fernandez, the coach-and-counsel documentation served to show that verbal documentation was not the first time the problem had been raised with the employee.

¹⁶ Casanas testified that he documented coach and counsels on a "progressive disciplinary form" that was given to "us" by human resources. No such document was received into evidence or referred to by any other witness.

2. On January 31, Grace investigated a guest complaint about front desk employee, Tony Chacon (Chacon), informed Chacon that he would "not [accept] guests [telling him] that one of [his] staff was rude or abrupt." Grace also told Chacon, essentially, that he needed to work on being friendly, accommodating, and helpful and that it was "the last time a guest should [tell Grace] that [Chacon] was not helpful, [or was] rude or abrupt."

3. On February 23, Grace held another coach-and-counsel with Chacon regarding his attitude with a guest on the telephone. Two hours later, another incident occurred between Chacon and a guest. Grace investigated the matter, told Chacon his behavior had been reprehensible and that he should be prepared to give a statement to Akopian, Fernandez, and possibly human resources. Grace informed Akopian and Fernandez of the incident in an e-mail dated February 23, stating that he had gotten "a version from [GSAs, Leslie and Mohammed] who told me that Tony should be sent home. I told them that it is near 11 pm and he will be leaving shortly."¹⁷ The February 23 e-mail contains no disciplinary recommendation.

4. On June 13, Finister and Grace together told front desk employee, Wanda Earl, to be more careful about assigning the correct room numbers to guests. Finister thereafter described the counseling in an e-mail to Fernandez.

At some point after Grace's February 23 coach-and-counsel described above, Grace recommended to Fernandez that discipline for Chacon be elevated as much as possible. Akopian and Fernandez issued Chacon a corrective action notice on February 24, for "[v]iolation of hotel rules and regulations" and causing "fear and concern of co-workers. . . ." The action box marked was "written." Although the written explanation in the "*Reason*" section, generally tracks the information Grace provided in his February 23 e-mail, there are additional details and quotations that suggest Fernandez and/or Akopian conducted additional investigation. For example, the corrective action notice gives the following information that is not contained in the e-mail: "[Your conduct] was described by the guest to be 'aggressive, rude, and alarming'; . . . according to the guest, [he] felt that Mohammed [another GSA] was appropriately meeting his needs;" "[Y]ou took it upon yourself . . . to 'take over' Mohammed's interaction with the guest."

As for employee discipline administered beyond the "coach-and-counsel" sessions described above, Fernandez testified as follows:

Q. [WAKEFIELD]: All right. What about going to the next step in discipline? What would happen, after a coach and counsel?

A. [FERNANDEZ]: Then, we would go, into verbal, verbal—I believe it is verbal documentation and then, we would go into written and then, termination, I believe, and then, for that Company that is—

Q. When you say, verbal, is it a documented verbal?

A. Yes. It would be an actual Form like this, in which we take the employee and say, I am officially speaking to

¹⁷ Fernandez testified that Grace had the authority to send an employee home when there was "some type" of misconduct or "in [the] particular case" of Chacon to refrain from doing so.

you and we have spoken, in the past before. That is why those coach and counseling documentations were—were important because this is not the primary—or this is not the first time we spoke with this individual about it. So, it would generally be the first major step or the second, I guess, major step, into the disciplinary process.

Q. Who would normally take those higher steps, in the progressive discipline process?

A. The higher the disciplinary process went, the more involved I wanted to be in it. So, when it came to written and, obviously, suspensions, based on investigations, even—even then, the Director of Human Resources would have to be involved. I placed myself, in that process, because I have to put a sense of importance, on that particular Step because going down that path leads to more grievous, you know, disciplinary actions.

Q. So, I take it, from—from that, [Grace] did not have the authority, to fire an employee?

A. Oh, no. No—no.

Q. And he did not have the authority, to do a written warning, on his own?

A. No. I would—I would like to be involved in that.

As a front office supervisor, Grace participated in Respondent's front office employee hiring process.¹⁸ The procedure Respondent followed in hiring front office employees and Grace's role therein was described by Fernandez:

Q. [WAKEFIELD]: Did Mr. Grace have any role, in the hiring process?

A. [FERNANDEZ]: Yes, he did.

Q. What was his role, in the hiring process?

A. He—he interviewed and, also, look[ed] over applications and resumes.

Q. Did he have the authority to make hiring decisions?

A. Solely, no. He could make recommendations, as he went through the interview process with us and speaking to the applicants and going over their resume[s]. Based on their background or their performance, in the interview, he can strongly suggest and—and we would hire, based on that.¹⁹

Q. Did he, in fact, interview or screen applicants?

A. Yes, he did.

Q. How is it you know that?

A. Because I required it. It is what we did together, as a management team. We would interview all the candidates, whether it is—we did it, as an informal group, or based on schedules that we had or based on the candidate's schedule. They would make their own arrangement to—to speak and interview that candidate.

¹⁸ Grace denied ever interviewing any employment applicant. Not only do I accept Fernandez' testimony for the reasons set forth above, but I also note that Casanas testified that he and other supervisors interviewed applicants and that management asked for his opinion of the candidate, which tends to corroborate Fernandez' testimony that front desk supervisors participated in the hiring process.

¹⁹ Fernandez did not specify who "we" and "us" were, but it is reasonable to infer that the pronouns refer to himself and other upper management officials.

Q. If Mr. Grace said to you, I do not like this particular candidate, would that have had any effect, upon your decision?

A. Yeah. That would have been fatal. I mean, we would not—we would not have proceeded with a candidate that does not have the support of their eventual Manager.

Q. If Mr. Grace had said to you, I think this person should be hired, would you have relied solely, upon that recommendation to hire?

A. Yes. I mean, I would certainly interview because that is part of the process that we do but that recommendation is very, very key.

Fernandez could not specifically recall any employee whom Grace interviewed. After reviewing Respondent's employment records, he testified as follows:

A. April, Wanda, Tony.

Q. What about those three?

A. Those are probably people that he helped with the hiring process because those are three least senior, newest people on board. I remember April. She is a very nice girl. I think he had helped us with her.

Q. When you said, help, what do you mean by that?

A. Help interview her, gave an approval, based on his conversations with her, based on her resume, at the time, and then, gave a recommendation of, yeah, . . . she is going to be great or no, we should not hire her.

Q. In the case of April, what was his recommendation?

A. Yes. Let us hire her. She is a wonderful girl, wonderful worker, good background.

V. DISCUSSION

There is no dispute that Respondent discharged Grace for wearing a union button, and Respondent has neither demonstrated nor argued that "special circumstances" vitiate its employees' right under Section 7 of the Act to wear and display union insignia while at work. Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act and discharge of an employee for doing so violates Section 8(a)(3) of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *Smithfield Packing Co.*, 344 NLRB 1 fn. 20 (2004).²⁰

Respondent defends its discharge of Grace on the ground that the Act did not protect him in wearing a union button because he was, at the time, a supervisor within the meaning of Section 2(11) of the Act. Respondent carries the burden of proving supervisory status. *Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866–1867 (2001); *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003) ("The party asserting

²⁰ The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores*, 342 NLRB 378, 379 (2004). The special circumstances exception is narrow and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid." *E & L Transport Co.*, 331 NLRB 640 fn. 3 (2000).

[supervisory] status must establish it by a preponderance of the evidence [citations omitted]). Thus, Respondent must establish that Grace had the authority to exercise at least one of the powers enumerated in Section 2(11) of the Act and that the use of that authority involved a degree of discretion that rises to the level of "supervisory independent judgment." *Dean & Deluca New York, Inc.*, supra, at 1247, citing *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). The Board construes any lack of specific evidence to support a finding of supervisory status against the party asserting supervisory status and conclusionary evidence is insufficient to establish supervisory status. *Armstrong Machine Co.*, 343 NLRB 1149 fn. 4 (2004), and cases cited therein; *Dean & Deluca New York, Inc.*, supra at 1247.²¹

Section 2(11) of the Act defines a "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. "The possession of even one of those attributes is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner." *Arlington Electric*, 332 NLRB 74 (2000), quoting *Union Square Theatre Management*, 326 NLRB 70, 71 (1998). The authority effectively to recommend "generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed," *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982). Grace had no authority to hire, transfer, suspend, lay off, recall, promote, discharge, or discipline employees, but he did possess limited authority in other of the 2(11) indicia. The crucial question in deciding whether his authority rose to the level of supervisory status is whether he exercised his authority with independent judgment and not in a merely routine or clerical manner. "The statutory term 'independent judgment' is ambiguous with respect to the degree of discretion required for supervisory status. . . . It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies."²² The Board is careful not to give too broad an interpretation to the statutory term "independent judgment" because assigning supervisory status results in the exclusion of the individual from the protections of the Act. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999); *McGraw-Hill Broadcasting Co.*, 329 NLRB 454, 459 (1999).

Respondent's assertion of Grace's supervisory status rests primarily on his possession of the following manifestations of authority:

1. Overseeing the front office department during his 3 to 11 p.m. shift.
2. Preparing front office schedules.

²¹ Also, it does not matter that Respondent may have believed, in good faith, that Grace was a supervisor within the meaning of the Act rather than a statutory employee. See *General Security Services Corp.*, 326 NLRB 312, 313 (1998).

²² *NLRB v. Kentucky River Community Care*, supra at 1867-1868.

3. Approving time off and accepting absence notification.
4. Calling unscheduled employees into work and releasing employees from work.
5. Assigning breaktime and overtime.
6. Purchasing food for employee consumption.
7. Coaching-and-counseling employees.
8. Participating in employee applicant interviews and making hiring recommendations.
9. Rewarding employees.
10. Regularly serving as MOD.

As for Grace overseeing the front office department during his shift, the fact that he was in charge of that department or even, as MOD, of a more extensive venue, does not establish that he exercised supervisory authority. Respondent must show that Grace's oversight required independent judgment. *Dean & Deluca New York, Inc.*, supra at fn. 13. The evidence demonstrates that Respondent's front office employees knew what their work assignments entailed and did not require more than limited oversight. Grace spent 70 percent of his time performing work similar to that done by others at the front desk, but was also responsible for ensuring that specific tasks were performed and that the front office department functions were covered. To meet the former responsibility, Grace followed an itemized checklist prepared by management; to meet the latter responsibility, Grace could assign employees to fill in for unmanned or undermanned departmental positions.²³ While Grace exercised a degree of discretion in making such temporary work assignments or in shifting employees around within their department to get the work done, there is no evidence that Grace did more than take into account production needs, employee availability, and employee capability in making work assignments. There is no evidence Grace independently devised work plans or did other than follow the task routines prescribed by Respondent. Grace's direction of employees in their performance of routine work does not demonstrate independent judgment. *Armstrong Machine Co.*, supra; *Central Plumbing Specialties*, 337 NLRB 973 (2002); see also *Hexacomb Corp.*, 313 NLRB 983, 984 (1994). Further, Grace's discussion of interpersonal employee conflicts with employees cannot demonstrate authority to resolve employee grievances or problems where he reported the discussion to a higher management level and left resolution of the matter there.

In connection with overseeing the front office department, the front office supervisors also handled guest complaints and directed security or maintenance employees to address reported problems. While Respondent conferred significant responsibility on the supervisors to care for guest needs and resolve guest complaints, there is no evidence that their handling of guest or maintenance problems involved the exercise of independent judgment in directing employees. While the supervisors could and did ask maintenance engineers to

²³ Two examples involved Grace assigning employees to cover the bell desk briefly and to assist on the switchboard.

look at a reported maintenance problem or request security staff to check out a security concern, there is no evidence the supervisors in any way told those employees how to perform their duties or how to resolve the maintenance or security problems. Consequently, the referral of a guest problem to the maintenance or security department constituted a routine response to predictable, recurring guest comfort issues. There is no evidence Grace's problem-solving authority in this regard affected employees' terms and conditions of employment. *Armstrong Machine Co.*, supra. Handling customer service issues does not, without more, confer supervisory authority. See *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1234 (2003).

Respondent also permitted the front office supervisors to set the room rates the GSAs could extend to walk-in customers, depending on occupancy levels. However, there is no evidence the front office supervisors determined the range of room rates or occupancy/room rate ratios. The front office supervisors' discretionary selection of room rates within the parameters of established guidelines is insufficient to show an exercise of independent judgment, which in any event, would not impact employee terms and conditions.

The front office supervisors prepared employee schedules for the front office.²⁴ They did so by reviewing the Hotel's current and projected occupancy rates and by following established staffing levels. There is no evidence the front office supervisors had any responsibility for setting the occupancy projections or staffing levels. In scheduling employees the supervisors had to, in Fernandez' words, "massage [the] staffing hours and guidelines," but they also had to follow "strict guidelines, as well as trying to balance what is actually going to be required, for a particular day or week." Scheduling of employees does not necessarily establish supervisory authority. *Dean & Deluca New York, Inc.*, supra at fn. 15, citing *Jordan Marsh Stores Corp.*, 317 NLRB 460, 467 (1995) (individual who directed, assigned, and made up the work schedules of employees was found not to be statutory supervisor). Here, the evidence is likewise insufficient to show that Grace exercised independent judgment in preparing employee schedules rather than simply applying guidelines established by Respondent's budgetary policies and its collective-bargaining agreement or otherwise exercised any of the statutory attributes of supervisory authority in scheduling employees.

Grace approved or denied employee requests for time off. With regard to such requests, Respondent's policy was to accommodate employees' time-off requests whenever possible. However, staff scheduling was ultimately based on the Hotel's occupancy levels, which dictated whether Grace could grant the requested leave. If he denied time off, the employee could "elevate" the request to a higher management level: the front office manager or Fernandez. There is no evidence as to what

action upper management customarily took when a disappointed employee appealed Grace's leave denial. As there is no evidence Grace had input into Respondent's staffing/occupancy ratios pursuant to which employees' time-off requests were evaluated and as employees could appeal Grace's denial of time off, the evidence does not establish that Grace's approval of time off involved the exercise of independent judgment.

Grace also accepted nonattendance notifications from employees, approved overtime, monitored breaktimes, called unscheduled employees into work, and released employees from work as staffing needs dictated. The evidence regarding his authority in these areas is essentially conclusory. The evidence lacks details of the existence or nonexistence of underlying instructions, or procedures, or criteria, which would aid in determining whether Grace exercised independent judgment or merely followed plans and policies established by someone else. The evidence also lacks examples of specific instances of implementation, which would give a clearer picture of Grace's authority in these matters. Conclusory evidence that an individual possesses employee oversight authority, does not, without more specificity, establish that individual as a statutory supervisor. See, for example: *NLRB v. Hilliard Development Corp.*, 187 F.3d 133, 146 (1st Cir. 1999) ("determination of order of lunch and other breaks is essentially clerical"); *Los Angeles Water & Power Employees' Assn.*, supra at 1235 (assertion of authority to grant or deny time off fails in absence of specific instances of exercise of authority); *Fleming Cos.*, 330 NLRB 277 (1999) (merely accepting notification that employees will not report to work does not show authority to grant or deny time off); *Sherwood Corp.*, 321 NLRB 477, 478 (1996) (authority to call employee in to work is not supervisory where individual cannot require attendance); *Millard Refrigerated Services*, 326 NLRB 1437, 1438 (1998) (decision to send employees home based on observation that there is no other work to be done does not involve the use of independent judgment); *Dean & Deluca New York, Inc.*, supra at fn. 15, citing *Jordan Marsh Stores Corp.*, supra (individual's direction and scheduling of employees does not necessarily establish that the individual is a statutory supervisor). Any lack of specific evidence to support a finding of supervisory status is construed against the party asserting supervisory status. *Armstrong Machine Co.*, supra at fn. 4; *Dean & Deluca New York, Inc.*, supra at 1048. The Board has said that "general, conclusory evidence, without specific evidence [that an employee] in fact exercises independent judgment . . . , does not establish supervisory authority. *Tree-Free Fiber Co.*, supra at 393. In the absence of evidence that Grace's authority in these areas involved independent judgment, I cannot find it conferred supervisory status on him. See *Billows Electric Supply of Northfield*, 311 NLRB 878 (1993).

As for employee discipline, Respondent asserts in its post-hearing brief that Grace issued documented verbal warnings (also called verbal documentations) to employees, which warnings constituted the initial step of Respondent's progressive disciplinary system. I cannot accept Respondent's assertion. Respondent presented no documentary evidence of any such warnings issued by any front office supervisor. It is reasonable

²⁴ Fernandez' testimony that he had the front office supervisors work on scheduling and payroll to help "develop . . . and cross-train" them with the object of their gaining some experience in those areas does not clearly demonstrate that the front office supervisors were fully responsible for scheduling, but I have assumed they were for purposes of this analysis.

to assume that since coach-and-counsel memorializations were kept in employee files, a fortiori, documented verbal warnings would likewise be placed there; Respondent's failure to produce any documented verbal warnings issued by a front office supervisor supports an inference that none exists. Moreover, although Fernandez did not specify which supervisory employee could issue a verbal documentation or "verbal" action as it is noted on Respondent's corrective action notice, there is nothing in his testimony to suggest that the front office supervisors were authorized to issue such discipline. The evidence shows only that the front office supervisors had responsibility to coach-and-counsel front office employees when they made mistakes, violated work rules, or committed procedural infractions. I find, therefore, that in dealing with employee misconduct, Grace was not authorized to do more than coach-and-counsel employees.

The question, of course, is whether the front office supervisors' authority to coach-and-counsel front office employees fits within any of the enumerated criteria of Section 2(11), the most germane of which is the authority to discipline other employees or effectively to recommend such action. Generally, the Board has considered authority to issue general counselings and verbal warnings to employees to be insufficient to demonstrate authority to discipline employees as required by Section 2(11). *Ken-Crest Services*, 335 NLRB 777, 778 fn. 10 (2001). Here, Respondent required its front office supervisors to address work rule violations with offending employees and to notify management they had done so. Respondent did not authorize the front office supervisors to take any further disciplinary steps. After the front office supervisors memorialized any coach-and-counsel incidents in communications to Fernandez and Akopian, upper management determined what, if any, followup discipline should be imposed. Although any coach-and-counsel documentation was placed in employee files, coach-and-counsel did not, standing alone, constitute discipline or affect any employee's job status but operated as a "reference" in succeeding disciplinary action.

The fact that coach-and-counsels were reference points in succeeding discipline does not answer the question of whether coach-and-counsels served a catalyzing function in Respondent's overall disciplinary process. Respondent argues that the evidence herein regarding front office supervisors' involvement in employee discipline parallels the facts in *Wilshire at Lakewood*, 345 NLRB 1050 (2005), where the Board found a registered nurse (RN) who served as a "weekend supervisor" possessed supervisory authority within the meaning of Section 2(11) of the Act.²⁵ In *Wilshire*, the RN, in pertinent part, checked and corrected employees in their tasks and, at her discretion, documented employee residential care infractions on a disciplinary form, thereby initiating review by managerial officials to determine whether further discipli-

nary action was warranted. On at least two occasions, the RN orally reported infractions—e.g., intoxication, break-time abuse, and failure to answer patient calls—resulting in a management decision to send the employees home, which decision the RN communicated to the offending employees.

The Board found that the RN had authority to issue, at her discretion, disciplinary writeups of employee infractions, which, placed in employees' personnel files, "constituted the first step in the process for possible discipline." Although the writeups did not necessarily lead to further disciplinary action in every instance, the Board emphasized that they played a "significant role in the disciplinary process," and were initiated by the RN's "independent determination that the committed infraction [was] egregious enough to warrant the writeup."²⁶ The Board declined to "say that the authority to decide whether to report an infraction makes a person a supervisor. Rather, [the Board said] that a person who is responsible for deciding whether to report an infraction, which report will initiate a disciplinary process, has supervisory authority."²⁷

The parallel between the facts in the instant case and those of *Wilshire* are, even without Respondent's cogent argument, apparent. However, a significant element present in *Wilshire* is missing herein: there is no evidence that the front office supervisors' coach-and-counsel responsibilities initiated Respondent's disciplinary process. Fernandez described the coach-and-counsel process as an opportunity for front office supervisors to instruct staff in proper procedures and explain to them the disciplinary steps that might follow failure to so conform their conduct. Documentation of a coach-and-counsel, which was placed in employee files, served only as a reference if another similar infraction occurred, as evidenced by Fernandez' testimony and by the fact that the preprinted information on Respondent's corrective action notice says nothing about coach-and-counsels. As for Respondent's argument that coach-and-counsels initiate Respondent's disciplinary process, of the four coach-and-counsels in which Grace was involved, only the egregious incident concerning Chacon resulted in any disciplinary followup; there is no evidence the others even generated any managerial consideration of discipline. Moreover, Grace made no recommendation of discipline in any coach-and-counsel documentation, which tends to undercut Respondent's argument that the coach-and-counsel documentation was intended to initiate the disciplinary process. I recognize there is a fine line between discretionary authority to report employee misconduct that will initiate a formal disciplinary process and the misconduct reportorial function that a leadperson might possess without incurring supervisory status. See *Los Angeles Water & Power Employees' Assn.*, supra at 1235 (individual's report of misconduct does not constitute effective recommendation of discipline where

²⁵ In *Wilshire at Lakewood*, 343 NLRB 141 (2004), the Board had reached a contrary conclusion regarding the RN's supervisory status. Following the Employer's petition for review of the Board's Order to the Eighth Circuit, the Board, sua sponte, reconsidered its decision and reversed its prior finding that the RN was not a statutory supervisor within the meaning of Sec. 2(11) of the Act.

²⁶ *Wilshire*, supra at fn. 5.

²⁷ *Wilshire*, supra at fn. 8.

management undertakes its own investigation and decides what, if any, discipline to impose); *Ryder Truck Rental*, 326 NLRB 1386 (1998) (authority to issue verbal or written warnings that do not affect employee status or to recommend discipline do not evidence disciplinary authority); *Millard Refrigerated Services*, supra at 1438 (1998) (employees did not effectively recommend discipline when they submitted disciplinary forms to the plant superintendent who approved them only after conducting an independent investigation; the employees exercised nothing more than a reportorial function that was typical of a “leadman” position). Here, although the evidence is not entirely clear, it appears that coach-and-counsel documentations are routinely placed in employee files without significant managerial review, do not constitute recommendation of disciplinary action, do not give rise to disciplinary action, are not utilized unless repetition of misconduct occurs, and even then become part of the disciplinary process only as a reference for managerial action, including investigation.²⁸ After consideration of all the evidence relating to Grace’s coach-and-counsel responsibility, I must conclude that his authority to report employee misconduct remains just that and does not cross over into supervisory territory.²⁹

Respondent argues that Grace’s e-mails to his supervisors regarding Chacon’s misconduct evidence an independent authority to discipline employees. It is true that, as noted in his January 31 e-mail to Fernandez and Akopian, Grace reported he had informed Chacon that he would “not [accept] guests [telling him] that one of [his] staff was rude or abrupt,” that [Chacon] needed to work on being friendly, accommodating, and helpful, and that it was “the last time a guest should [tell Grace] that [Chacon] was not helpful, [or was] rude or abrupt.” While Grace clearly cautioned Chacon that future infractions could result in discipline, the evidence fails to show that Grace could, himself, instigate any such discipline; rather, the supervisory authority implied by Grace’s admonition appears to have been self-conferred. Self-proclaimed authority does not confer statutory authority. See *Billows Electric Supply of Northfield*, supra.

It is also true that Grace’s February 23 e-mail to Fernandez and Akopian implies that he independently decided that evening not to send Chacon home after his contretemps with a

guest.³⁰ Further, Fernandez testified that Grace had the authority to send an employee home when there was “some type” of misconduct or, “in [the] particular case” of Chacon, to refrain from doing so. The authority to send employees home for engaging in misconduct is typically considered evidence of supervisory authority. *Bredero Shaw*, 345 NLRB 782, 783 (2005). However, an exception exists to that rule. If the authority to send refractory employees home is limited to instances of egregious misconduct, the Board does not consider the authority meets statutory supervisory indicia. *Bredero Shaw*, supra, citing *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999), and *Washington Nursing Home*, 321 NLRB 366 fn. 4 (1996). Here, the evidence is insufficient to determine whether Grace’s authority to send misbehaving employees home fits within the typical supervisory authority rule or within the exception to the rule. I cannot examine past instances of Grace’s exercise of such authority because no evidence shows he ever sent any employee home for misconduct. I cannot rely on Fernandez’ testimony to resolve the question because his testimony does not explicate the extent of Grace’s authority. While I accept Fernandez’ assertions that Grace could send an employee home for “some type” of misconduct or could refrain from doing so in Chacon’s “particular case,” his testimony does not clarify whether or not the determination to send an employee home would turn on the egregiousness of the misconduct. Since the Board construes any lack of specific evidence to support a finding of supervisory status against the party asserting supervisory status,³¹ I cannot find that Grace’s authority to send recalcitrant employees home establishes his supervisory status.

Regarding Grace’s participation in the hiring of front office employees, the evidence is not clear as to what Respondent’s hiring process entails. No evidence was adduced as to who initially reviewed applications and determined which applicants would be interviewed, although Fernandez testified that Grace “looked over” applications and resumes.³² There is no evidence that the front office supervisors were significantly involved at any stage of hiring prior to the interview. Grace’s role in the interview process, as described by Fernandez, was that “he could make recommendations, as he went through the interview process with us . . . [and could] strongly suggest and we would hire based on that.” Although Fernandez said that front office supervisor disapproval would be fatal to an applicant’s employment chances, no evidence was presented of any applicant to whose employment a front office supervisor objected or of any applicant to whose employment Grace’s favorable opinion was pivotal. Fernandez named employees “April,

²⁸ The discipline meted to Chacon is an example of how Respondent’s system worked. The February 23 coach and counsel was the second given to Chacon in as many months. After Chacon’s second coach and counsel, Fernandez and Akopian dealt with his discipline and, although Grace recommended Chacon’s discipline be elevated as much as possible, he was disciplined only at “written,” the second of five disciplinary levels.

²⁹ In its posthearing brief, Respondent refers to the coach and counsels as “discipline” and to their documentation as “documented verbal warnings” or “disciplinary writeups.” There is nothing in the record to support or justify such characterizations, which carry connotations of formal disciplinary actions, and I reject both the characterizations and the connotations.

³⁰ Grace informed Fernandez and Akopian that Leslie and Mohammed’s opinion was that Chacon should be sent home, but Grace told them Chacon would leave shortly (apparently when his shift ended).

³¹ *Armstrong Machine Co.*, supra at fn. 4; *Dean & Deluca New York, Inc.*, supra at 1247.

³² Reviewing applications and resumes would not, in any event, constitute effective recommendations for hire. *Wake Electric Membership Corp.*, 338 NLRB 298 (2002).

Wanda, [and] Tony” as applicants whose “hiring process” Grace “probably . . . helped with.” Fernandez specifically remembered April as a very nice girl whose hiring he thought Grace had assisted with by helping to interview her, giving his opinion of her as “a wonderful girl, wonderful worker, good background,” and by saying, “Let us hire her.”³³

Given the above evidence, it does not appear that Grace independently conducted any part of the hiring process. At every stage, Grace’s involvement was in conjunction with upper management officials. See *Ryder Truck Rental*, supra at fn. 9 (“Where supervisors . . . participate in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Sec. 2(11).”). Further, no evidence supports a finding that the front office supervisors’ evaluative role went beyond voicing approval of an applicant management was considering for hire. The Board does not consider “compatibility recommendations” sufficient “to support a finding of hiring authority within the meaning of Section 2(11) [citations omitted].” *Tree-Free Fiber Co.*, 328 NLRB 389, 391 (1999).³⁴

Respondent argues that Grace could reward employees as contemplated in Section 2(11) of the Act, citing his discretionary purchase of food for employee consumption, creation of employee incentives, and preparation of a bulletin board with employee pictures to “increase employee morale.” The only one of these actions to affect employment terms is the monetary incentive program. But it does not appear from Fernandez’ testimony that the front office supervisors did more than oversee that program: “. . . we have [an incentive program] there, which . . . the supervisors would take turns in looking after—which, if you sold a certain room and you were able to up-sell it, you would be given a small percentage of that revenue and then, they would track that and we would place on the boards . . . for people to see.” There is no evidence the front office supervisors set the incentive revenue percentage or awarded the incentive money discretionally. Their mere oversight of the program is a clerical function at most. Respondent also contends that Grace could reward employees by granting time off, either for vacation or personal leave. Although Grace approved time off, as discussed above, there is no evidence he could do so as a reward to employees.

It is true that the front office supervisors, including Grace,

served as the Hotel’s MOD at certain periods and that the MOD was the focal point for problem reporting and resolution. However, although MOD assignment unquestionably demonstrated that Respondent regularly entrusted valuable assets and important responsibilities to Grace’s care, the mere fact that Grace functioned as the MOD does not establish that he exercised supervisory authority during those occasions. *Dean & DeLuca New York, Inc.*, supra at fn. 13. While serving as MODs, the front office supervisors were expected to follow Hotel policies and procedures, could contact Fernandez as needed, and informed him of events upon his return to the Hotel. There is no evidence that the front office supervisors exercised independent judgment during their MOD stints rather than adhering to established policies and procedures with followup reporting to Fernandez. Such does not show statutory supervisory authority. See *Training School at Vineland*, 332 NLRB 1412 (2000) (service as the highest ranking employee on site does not establish supervisory without evidence of Sec. 2(11) indicia).

Respondent also contends that Grace’s supervisory status is established by the following evidence: (1) Grace was included in managerial meetings that focused on employee issues and performance; (2) Respondent required Grace to sign Respondent’s “code of business conduct” and “policy against insider trading” forms aimed at “avoiding abuses of power”; (3) front office employees treated Grace as a supervisor, notifying him if unable to show up for work, coming to him with “concern[s],” and directing serious customer complaints to him; (4) Respondent held Grace out to employees and customers as a supervisor and so indicated his status by his name tag; (5) Respondent paid Grace a higher wage than other front office employees; (6) Grace posted notices that front office employees were required to review regarding upcoming hotel events; and (7) Grace had access to and made entries in the MOD log, thereby notifying senior management as to issues arising during his shift. While these factors may constitute so-called secondary indicia of supervisory status, the Board has held consistently that secondary indicia are not dispositive of a supervisory issue without evidence of at least one primary indicator of supervisory status. See, e.g., *Central Plumbing Specialties*, supra; *Billows Electric Supply of Northfield*, supra at fn. 2; *Juniper Industries*, 311 NLRB 109, 110 (1993).³⁵ Here, Respondent has not demonstrated that Grace possessed any primary statutory indicator of supervisory status.

In sum, I find Respondent has not met its burden of showing that Grace was a supervisor at any relevant time hereto. I find Grace was a statutory employee entitled to the Act’s protections on June 25 when Fernandez fired him for wearing a union button. Accordingly, Respondent’s termination of Grace violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a

³³ However, in later testimony, Fernandez admitted he was “not positive” Grace had interviewed April, Wanda, or Tony Chacon.

³⁴ *Detroit College of Business*, 296 NLRB 318 (1989), and *Venture Industries*, 327 NLRB 918 (1999), cited by Respondent, are distinguishable. In *Detroit*, the employer provided clear and specific evidence that hiring was a joint decision between coordinators, whose status was at issue, and the associate dean and that no instructor has ever been hired without coordinator consent. In *Venture*, it appears that the line and department supervisors, whose status was at issue, independently interviewed existing employees for in-plant job postings, and then made a selection recommendation to the department manager. Moreover, the line and department supervisors could issue oral or written reprimands to employees. In both cases, unlike the instant matter, the evidence as to the target individuals’ authority is clear and specific.

³⁵ *McClatchy Newspapers*, 307 NLRB 773, 779 (1992) (secondary criteria such as attendance at management meetings “do not establish supervisory status by themselves”); *Central Plumbing Specialties*, supra at 975 (secondary criterion of higher pay does not establish supervisory status.)

business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Kevin Grace because of his protected activities.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including offering reinstatement to Grace and making him whole for any loss of earnings and other benefits he suffered through Respondent's unlawful conduct to be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent, citing *Precoat Metals*, 341 NLRB 1137 (2004), argues that Grace is not entitled to reinstatement and backpay essentially because he gave false testimony herein. In *Precoat*, the Board found an alleged discriminatee had "forfeited his entitlement to reinstatement and backpay" because he gave false testimony in his pretrial affidavit and at the hearing. In reaching its conclusion, the Board distinguished between a situation in which an alleged discriminatee's testimony is discredited and one in which the witness has "deliberately lied." The Board asserted that it was not denying the alleged discriminatee customary remedies because he was discredited but because he deliberately lied. In the instant matter, I have discredited the testimony of Grace where it conflicts with that of Fernandez. I have not made, and do not make, any finding that Grace has deliberately lied. Accordingly, I decline to deny the Board's normal remedies to Grace. As for Respondent's assertion that Grace is presently disabled, determination of that question and its ramifications for reinstatement and backpay are left to the compliance stage of these proceedings.

[Recommended Order omitted from publication.]